UPOA v. City & DOP, 51 OCB 48 (BCB 1993) [Decision No. B-48-93]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of

United Probation Officers Association,

Petitioner,

- and -

City of New York,, Department of Probation,

Respondent.
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Decision No. B-48-93

Docket No. BCB-1600-93

DECISION AND ORDER

On August 18, 1993, the United Probation Officers Association ("the Union") filed a verified scope of bargaining petition against the City of New York ("the City") and its Department of Probation ("the Department"). The Union alleges that the department refused to bargain on the impact of the provision of the City Charter which requires that every person seeking employment with the City shall agree, as a condition precedent to employment, to pay the equivalent of the City resident income tax in the event that he or she becomes a non-resident (hereinafter "city tax waiver".) As a remedy, the Union requests that the Board of Collective Bargaining determine, pursuant to S 12-307a of the Now York City Collective Bargaining Law ("NYCCBL")[1] and Title 61, § 7.3(c) of the Rules of the City

[1] Section 12-307 of the NYCCBL, entitled "Scope of collective bargaining; management rights", provides, in relevant part:

> a. Subject to the provisions of subdivision b of this section and subdivision c of section 12-304 of this chapter, public employers and certified or designated
> (continued...)

of New York ("RCNY"),[2] that this bargaining demand is within the scope of collective bargaining.

(... continued)

> employee organizations shall have the duty to bargain in good faith on wages (including but not limited to wage rates, pensions, health and welfare benefits, uniform allowances and shift premiums), hours (including but not limited to overtime and time and leave benefits), [and] working conditions....
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> b. It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. Decisions of the city or any public employer on those matters are not within the scope collective bargaining....

Section 12-304 of the NYCCBL, entitled "Application of chapter", provides, in relevant part:

> This chapter shall be applicable to:
> ...
> c. any other public employer, and to the public employees and public employee organizations thereof, upon the election by the public employer or the head thereof by executive order of the chief executive officer to make this chapter applicable....

[2] Title 61, § 1-07 of the RCNY provides:

c. Scope of Collective Bargaining and Grievance"Arbitration. A public employer or certified or designated public employee organization which is party to a disagreement as to whether a matter is within the scope of collective bargaining under § 12-307 of this statute ... may petition the Board for a final determination thereof.

The Department,, by the New York City Office of Labor Relations ("OLR"), filed an answer on September 13, 1993. The Union chose not to submit a reply, although it was advised of its right to do so.

Background

The Union in the certified bargaining representative of probation officers, supervisory probation officers and probation officer trainees employed by the Department. Section 1127 of the City Charter provides that every person seeking employment with the City shall agree, an a condition precedent to employment, to pay the equivalent of the City resident income tax in the event that he or she becomes a non-resident.[3] The Department requires

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[3] Section 1127 of the City Charter was enacted as § 822 of the City Charter, Local Law 1973,, No. 2. Section 822 was recodified as § 1127 of the City Charter in November 1988.

Section 1127 of the City Charter provides:

Condition precedent to employment. a. Notwithstanding the provision of any local law, rule or regulation to the contrary,, every person seeking employment with the city of New York or any-of its agencies regardless of civil service classification or status shall sign an agreement as a condition precedent to such employment to the effect that if such person is or becomes a nonresident individual as that term is defined in section 11-1706* of the administrative code of the city of New York or any similar provision of such code,, during employment by the city,, such person will pay to the city an amount by which a city personal income tax on residents computed and determined as if such person were a resident individual, as defined in such section,, during such employment, exceeds the amount of any city earnings tax and city personal income tax imposed on such person for the same taxable period.

(continued...)

all non-resident employees to sign an agreement by which they consent, as a condition of employment, to having deducted from their wages a sum of money equal to the amount required to be withheld from resident employees for purposes of the City personal income tax.

In September 1991, the Union filed a request for arbitration, claiming that the Department "has been and is violating the Probation Officers Agreement by deducting City withholding tax from non-City residents who were hired by the Department between January 1, 1973 and January 1, 1974." The City challenged the request, claiming that the Union had failed to demonstrate a nexus with a contract provision or a rule or policy of the Department; that a claimed violation or

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(... continued)

> b. Whenever any provision of this charter,, the administrative code of the city of New York or any rule and regulation promulgated pursuant to such charter or administrative code employs the term "salary,," "compensation," or any other word or words having a similar meaning, such terms shall be deemed and construed to mean the scheduled salary or compensation of any employee of the city of New York, undiminished by any amount payable pursuant to subdivision a of this section.

* Although § 1127a refers to § 11-1706 of the Administrative Code ("Credits against tax") for a definition of nonresident individual, the definition is actually provided in § 11-1705 of the Administrative Code ("General provisions and definitions"). Section 11-1705 provides,, in relevant part:

> 2. City nonresident individual. A city nonresident individual means an individual who is not a city resident.

misapplication of the City Charter is not an appropriate basis for a grievance; and that the dispute was not a wage dispute of the type previously found arbitrable by the Board of Collective Bargaining.

In Decision No. B-25-92, issued in May 1992, the Board found "at least an arguable relationship between the subject matter of the grievance and the salary provision (Article III) of the Unit Economic Agreement." The decision defined the issue in dispute as the question of whether the City had a "right to withhold portions of the contractual wages payable to Respondent Dominic Coluccio and others similarly situated." The Board held that the relevance or applicability of § 1127 to the dispute goes to the merits of the case and is a matter for an arbitrator to decide. The City members dissented, claiming that no nexus had been established between the act complained of and any contract provision. They argued that the only issue sought to be arbitrated was whether the City was implementing and interpreting a local law appropriately, which they claimed to be a matter solely within the jurisdiction of the courts.

The City brought an appeal of the Board's decision[4] under Article 78 of the Civil Procedure Laws and Rules.[5] In March

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[4] New York City Dept. of Probation and City of New York v. Malcolm D. MacDonald. New York City Board of Collective Bargaining and United Probation Officers Association, N.Y. Sup. Ct., Index No. 42861/92 (1993).

[5] Ch. 308, Laws of 1962.

1993, the City's petition was dismissed in State Supreme Court. The City has filed a notice of appeal.

In March 1993, the Union signed an agreement with OLR whereby it agreed to be covered by the terms of the collective bargaining agreement ("the contract") negotiated between the City and the Coalition of Municipal Unions, including "all economic Matters."[6] The 1993 Municipal Coalition Agreement does not include a provision concerning the city tax waiver.

The City has submitted into evidence an affirmation by Eric Washington, who was an Assistant Commissioner of Labor Relations

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[6] The "Election to be covered by the terms of the Municipal Coalition Agreement" provides:

WHEREAS, the undersigned union ("the Union") has not elected to be a member of the Coalition of Municipal Unions but desires to enter into collective bargaining agreements, including the agreement affixed hereto (the "Municipal Coalition Agreement") and an agreement ("Separate Unit Agreement") successor to the existing separate unit agreement terminating on the date indicated below covering the employees represented in the Union; and

WHEREAS, the Union intends by_ the affixed Municipal Coalition Agreement to cover all economic matters and to incorporate the terms of said Municipal Coalition Agreement into the Unions Separate Unit Agreement,

NOW, THEREFORE, the Union hereby elects to be covered by all terms and conditions set forth in the affixed Municipal Coalition Agreement on behalf of the employees in the bargaining unit described below.

Name of Union: United Probation Officers Association ("UPOA")

Name of Bargaining Unit: Probation Officers

Termination date of existing separate unit agreement: September 30, 1991

at OLR until March 1993.[7] Washington participated in the negotiations between the City and the Union for the contract term October 1991 to December 1994. According to Washington, the Union did not present a demand to the City regarding § 1127 during the negotiations, although there were discussions with the Union regarding its position that the waivers violated the contract.

The Union earlier had presented a demand concerning § 1127 during negotiations in May 1992 for a successor agreement. Washington responded to the demand in June 1992 by telling the Union that "the City would not enter into a collective bargaining agreement which was contrary to law." He states:

> [a]t that time, the UPOA modified its demand to state that the union was seeking to alleviate the economic effects of section 1127.... I indicated to the UPOA that I would have the cost of alleviating section 1127 calculated and present that to the union as soon as practical.... At no time did I indicate to the UPOA that the City did not intend to negotiate with the UPOA over alleviation of the economic impact of section 1127 on UPOA members. Indeed, the calculation of the cost of such alleviation was completed and was presented to the Union....

The City and the Union entered into a contract in March 1993, and all demands presented by the partied which were not incorporated into that agreement were deemed abandoned. The demand pursued by the Union in the instant scope of bargaining

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[7] RCNY, Title 61,, §1-07(i) provides, "[a]dditional facts or new matter alleged in the answer shall be deemed admitted unless denied in the reply." Because the Union did not deny Washington's allegations in a reply, they must be deemed to be admitted.

petition is identical to the demand which it pursued during collective bargaining for the most recent agreement.

By letter dated May 11, 1993, the Union requested bar gaining on the impact of the city tax waiver on all non-city residents in the bargaining unit. By letter dated June 22, 1993, the attorney for the Union informed OLR that if the Union did not receive a response to its letter, it would file a petition alleging failure to bargain. OLR responded by letter dated June 30, 1993, advising the Union that the city tax waiver for non-city residents was not within the scope of collective bargaining. It also stated that the demand for bargaining on this issue had been raised by the Union in the last round of negotiations, and had been abandoned. For that reason, the City claimed, it was "not required to reopen the current collective bargaining agreement as to this issue."

Positions of the Parties

Union's Position

The Union claims that it has neither waived nor abandoned its bargaining demand on tax waivers, as evidenced by its request to bargain. It asserts that the issue was "mutually not raised by the parties, which ... facilitated the settlement of the most recent agreement." Although it does not challenge the applicability or validity of § 1127, the Union maintains, the economic impact of § 1127 remains open for negotiation.

The Union maintains that the requirements of § 1127 were implemented unilaterally by the Department, without any effort to bargain, discuss or explain the effect of that section on probation officers. It also claims that, as this policy is now implemented, non-residents are taxed by the City on all earnings, including those of a non-resident spouse who does not work in the city.

The Union cites Decision No. B-25-85 for the proposition that when an employer "has suddenly and unilaterally reversed itself and established Section 822 as a condition of employment, [the union] has a right to bargain over the effect of such change." It states that the Board also held in that decision that "where, as in the instant proceeding, there has been a refusal to confer with the certified employer representatives regarding a change affecting terms and conditions of employment, there is ... interference with the effectiveness of the employee representative and ... the rights of the employees which it represents" and that such an action constitutes a violation of § 12-306a(3) of the New York City Collective Bargaining Law ("NYCCBL").[8]

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[8] Section 12-306 of the NYCCBL provides, in relevant part:

> **a. Improper public employer practices.** It shall be an improper practice for a public employer or its agents:
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> ....
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> (3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization.

Before February 1991, the Union claims, the Department did not require that the tax be deducted from employees' paychecks. By requiring employees to consent to such a deduction, the Union argues, the Department changed a term and condition of employment and deliberately circumvented the rights of the Union as the bargaining representative of its members.

City’s Position

The City states that § 1127 of the City Charter requires all non-resident employees of the City to agree, as a pre-condition of employment, to pay an amount equal to the rate of city tax that they would pay if they were city residents. The City maintains that all employees of the Department are required to sign an agreement pursuant to the terms set forth in § 1127 before being employed or promoted by the City.

Contrary to the Union's assertion that this requirement did not exist before February 1991, the City contends that the President of the Union, signed such an agreement in 1987 upon his promotion to Supervising Probation Officer.[9] The City asserts

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[9] The Department has introduced into evidence, an its Exhibit D, a copy of a document entitled "Agreement Under Section 822 of the New York City Charter," signed by Dominic Coluccio, president of the Union, and dated July 30, 1987. The agreement provides, in relevant part:

> Pursuant to the provisions of Section 822 of the New York City Charter, I agree that if I an or become a non-resident individual as that term is defined in Section T46-6.0 of the Administrative Code of the City of New York (a portion of which section is printed below) or any

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that the agreement signed by Mr. Coluccio in 1987 is evidence that such a requirement existed before 1991. The City maintains that when Mr. Coluccio became a non-resident City employee, sometime after March 1991, the Department began to deduct the appropriate amount of tax from his paycheck.

The City claims that in February 1991, the Department discovered that the City's Payroll Management System had entered incorrect tax exclusion codes for forty Department employees. As a consequence, it asserts, the City deducted nothing from the

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(... continued)
similar provisions of such Code at any time during my employment by the City of New York,, hereinafter called the City:

1. 1 will pay to the City an amount by which a city personal income tax on residents computed and determined as if I were a resident individual, as defined in such section, during such employment, exceeds the amount of any city earnings tax and personal income tax imposed on me for the same taxable period.

2. The City may,, at each payroll period,, deduct and withhold from my wages or compensation, an amount equal to the amount it would be required to withhold for city personal income tax on residents if I were a resident individual an defined in such section, to be credited to my city earnings and/or income tax liability and to my liability under this agreement and said Section 822 of the New York City Charter.

3. Within ten days of filing them, I will furnish the Commissioner of Finance of the City with copies of my Federal income tax return and my State income tax return (if any).

4. Whenever my status as a non-resident individual or a resident individual changes, I will notify the head of the agency by which I an then employed, the City Personnel Director, and the Commissioner of Finance of such change....

paychecks of some non-residents while deducting non-resident taxes from the paychecks of some city residents. It states that the codes wore corrected in February 1991.[10]

The City claims that the Department did not institute a new policy or form in February 1991, as alleged by the Union. It argues that, since there has been no change in the terms and conditions of employment of Union members, the instant issue does not constitute a mandatory subject of bargaining and can be addressed by the Union only in the normal course of collective bargaining.

The City cites § 12-31la(3)[11] of the NYCCBL, and argues that the Union has failed to prove a change in circumstances or a change affecting terms and conditions of employment which would warrant renegotiating the parties* contract. it claims that the non-resident tax has been required as a precondition of employment since 1973, and that the President of the Union was

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[10] The City asserts that Mr. Coluccio was not one of the employees whose code was incorrectly noted in the Payroll Management System.

[11] Section 12-31la(3) of the NYCCBL provides:

Nothing herein shall authorize or require collective bargaining between parties to a collective bargaining agreement during the term thereof, except that such parties may engage in collective bargaining during such term on a matter within the scope of collective bargaining where (a) the matter was not specifically covered by the agreement or raised as an issue during the negotiations out of which such agreement arose and (b) there shall have arisen a significant change in circumstances with respect to such matter, which could not reasonably have been anticipated by both parties at the time of the execution of such agreement.

aware of the requirement at least since 1987, when he signed such an agreement.

The City asserts that, in bargaining for the current contract, the Union made a demand of the City by which it sought to alleviate the economic impact of the non-resident tax requirement. The negotiations concluded, the City claims, with a contract that was intended "to cover all economic matters" and did not include a provision addressing the non-resident tax. The City alleges that the Union's demand was withdrawn when the parties reached an agreement.

The City contests the Unions reliance on Decision No. B-25-85. It maintains that, in the instant dispute, there has been no change in a term and condition of employment. Since the Department has always adhered to the provisions of § 1127, the City argues, it cannot be required to reopen the contract.

DISCUSSION

Section 12-31la(3) of the NYCCBL sets forth the rights of parties regarding aid-term collective bargaining. Specifically, this section provides:

> Nothing herein shall authorize or require collective bargaining between parties to a collective bargaining agreement during the term thereof, except that such parties may engage in collective bargaining during such term on a matter within the scope of collective bargaining where (a) the matter was not specifically covered by the agreement or raised as an issue during the negotiations out of which such agreement arose and (b) there shall have arisen a significant change in circumstances with respect to such matter, which could

not reasonably have been anticipated by both parties at the time of the execution of-such agreement.[12]

We note,, however,, that the statute does not bar demands made in the ordinary course of bargaining which contemplate reopening negotiations an a specific subject.[13]

The issues we must reach here are (1) whether the Department, by its action, effected a change in a term or condition of employment; and (2) whether the demand raised in bargaining by the union was intended to survive the conclusion of the negotiations which resulted in the present contract between the parties. Only if either of these conditions existed would the Union be entitled to raise this demand in mid-term collective bargaining.

The Union relies on Decision No. B-25-85, in which we held that where an employer "has suddenly and unilaterally reversed itself and established Section 822 as a condition of employment, [the union] has a right to bargain over the effect of such change." It states that the Board ruled therein that "where ... there has been a refusal to confer with the certified employer representatives regarding a change affecting terms and conditions of employment, there is ... interference with the effectiveness of the employee representative and ... the rights of the

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[12] See also Decision No. B-59-89; B-21-75; but see Decision No. B-66-89, in which an unforeseen change in circumstances brought a matter within the scope of collective bargaining during the term of the agreement.

[13] Decision Nos. B-21-75; B-18-75.

employees which it represents" and that such an action constitutes a violation of § 12-306a(3) of the NYCCBL.

In Decision No. B-25-85, it had been the written position of the employer, the Health and Hospitals Corporation ("HHC"), for tan years, that § 822 vas inapplicable to its employees. During that ten-year period, the parties engaged in collective bargaining and entered into agreements in regular succession. This dispute arose when HHC reversed this longstanding policy and established the provisions of § 822 as a condition of employment, without notice to the union. The Board hold that, "in the unique circumstances of the case," HHC was required to bargain with the union over the effect of the change.

We find the Union's reliance on this decision to be misplaced, since the circumstances in the instant dispute differ from those in the cited decision. The Union claims that the Department effected a change in a term or condition of employment beginning in 1991. The City, however, has offered Mr. Coluccio's 1987 agreement with the Department as evidence that the Department has long adhered to the provisions of § 1127 and that the Union has been aware of the requirement at least since 1987. We find this evidence to be persuasive, and find that the Union has failed to demonstrate that the Department has effected a unilateral change in a term or condition of employment which would warrant aid-term bargaining.

The Union also claims that its demand regarding the economic impact of the nonresident tax was not fully negotiated in

bargaining for the current contract. The City has offered evidence, unrebutted by the Union,, that the Union did make such a demand, but that the negotiations concluded with a contract that was intended "to cover all economic matters" and did not include a provision addressing the Union*s demand. We agree with the City that the Union,'s demand must be considered to have been withdrawn at the time the parties reached an agreement.[14] For this reason, we find that the demand raised by the Union concerning taxes on non-resident employees has been fully negotiated, and is outside the scope of aid-term bargaining.

Accordingly, for the above reasons,, we will dismiss the Union,'s petition requesting bargaining on the economic impact of the requirements of § 1127 of the City Charter.

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[14] See Decision No. B-35-93.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby,

ORDERED,, that the scope of bargaining petition filed by the United Probation Officers Association and docketed as BCB-1600-93 be, and the same hereby is, dismissed.

Dated: New York, New York
November 23, 1993

MALCOLM D. MACDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

CAROLYN GENTILE
MEMBER

STEVEN WRIGHT
MEMBER